RECENT AMERICAN DECISIONS.

In the New York Court of Appeals.

MOULTRIE ET AL. *vs.* HUNT.

1. In executing a will of personal property, the testator must observe the formalities required by the law of his domicil, and not those of the place where the will is made. The maxim "locus regit actum" has no place in English or American testamentary jurisprudence. This principle is universally true when the domicil continues to the time of the testator's death.

2. If the testator, after executing the will, changes his domicil and resides under another jurisdiction at his death, the formalities required by the new domicil must have been observed, or the will is void.

3. A will is an inchoate and provisional transaction until the testator's death, and the law may require, after its execution, new formalities to be complied with. These, as well as other formalities, must have been observed by all testators domiciled in the jurisdiction at the time of their death, without reference to their domicil when the will was executed.

4. In order that the principles of "comity" may be invoked in favor of the wills of testators domiciled elsewhere, they must have resided in another State at the time of their death. The will is then enforced in accordance with the rules of international law applicable to the subject.

5. An act done in another State, in order to create rights which our Courts ought to enforce on the ground of comity, must be of such a character, that if done in this State in conformity with its laws, it could not be constitutionally impaired by subsequent legislation. Per DENIO, J.

6. H., the alleged testator, made his will of personal estate in South Carolina, where he then resided. He did not, when it was executed, declare to the subscribing witnesses that it was his last will and testament. This declaration was not necessary by the law of that State, and it was conceded that the will was at the time properly executed for South Carolina purposes. After making his will he removed to New York, where he resided at the time of his death. In this State such a declaration is necessary. He died without republishing his will. *Held*, that the will was void, and that H. died intestate.

7. The law of the continent of Europe is not to be resorted to in determining a question of this kind, until the sources of instruction, furnished by the Courts and jurists of England and of this country, have been exhausted.

The opinion of the Court was delivered by

DENIO, J.—One of the requisites to a valid will of real or personal property, according to the Revised Statutes, is, that the

testator should, at the time of subscribing it, or at the time of acknowledging it, declare, in the presence of at least two attesting witnesses, that it is his last will and testament: 2 R. S., p. 63, § 40. The will which the Surrogate of New York admitted to probate, by the order under review, was defectively executed in this particular—the only statement which the alleged testator made to the witnesses being that it was his signature and seal which was affixed to it. It was correctly assumed by the Surrogate in his opinion, and by the Supreme Court in pronouncing its judgment of affirmance, that the instrument could not be sustained as a will under the provisions of the Revised Statutes, but that, if it could be upheld at all, it must be as a will executed in another State, according to the law prevailing there; and, upon that view, it was established by both these tribunals as a valid testament. In point of fact the instrument was drawn, signed, and attested at Charleston, in South Carolina, where such a declaration of the testator to the witnesses, as has been mentioned, is not required to constitute a valid execution of a will. Mr. Hunt, the alleged testator, resided at that time in Charleston; but, some time before his death, he removed to the city of New York, and he continued to reside in that city from that time until his death. The will was validly executed according to the laws of South Carolina.

Although the language of our statute, to which reference has been made, includes, in its generality, all testamentary dispositions, it is, nevertheless, true, that wills, duly executed and taking effect in other States or countries, according to the laws in force there, are recognised in our Courts as valid acts, so far as concerns the disposition of personal property: *Parsons* vs. *Lyman*, 20 N. Y. 103. This is according to the law of international comity. Every country enacts such laws as it sees fit as to the disposition of personal property by its own citizens, either *inter vivos* or testamentary; but these laws are of no inherent obligation in any other country. Still, all civilized nations agree, as a general rule, to recognise titles to movable property created in other States or countries in pursuance of the laws existing there, and by parties domiciled in such States or countries. This law of comity is

parcel of the municipal law of the respective countries in which it is recognised, the evidence of which, in the absence of domestic legislation or judicial decisions, is frequently sought in the treatises of writers on international law, and in certain commentaries upon the civil law, which treat more or less copiously upon subjects of this nature.

If the alleged testator in the present case had continued to be an inhabitant of South Carolina until his death, we should, according to this principle, have regarded the will as a valid instrument, and it would have been the duty of our Probate Courts to have granted letters testamentary to the executors named in it. The statute contemplates such a case when it provides for the proving of such wills upon a commission to be issued by the Chancellor, and for granting letters upon a will admitted to probate in another State: 2 R. S., p. 67, §§ 68, 69. These provisions do not profess to define under what circumstances a will made in a foreign jurisdiction, not in conformity with our laws, shall be valid. It only assumes that such wills may exist, and provides for their proof.

The question in the present case is, whether, inasmuch as the testator changed his domicil after the instrument was signed and attested, and was, at the time of his death, a resident citizen of this State, he can, within the sense of the law of comity, be said to have made his will in South Carolina. The paper which was signed at Charleston had no effect upon the testator's property while he remained in that State, or during his lifetime. It is of the essence of a will that, until the testator's death, it is ambulatory and revocable. No rights of property, or powers over property, were conferred upon any one by the execution of this instrument; nor were the estate, interest, or rights of the testator in his property in any way abridged or qualified by that act. The transaction was, in its nature, inchoate and provisional. It prescribed the rules by which his succession should be governed, provided he did not change his determination in his lifetime. I think sufficient consideration was not given to this peculiarity of testamentary dispositions, in the view which the learned Surrogate took of the case. According to his opinion, a will, when signed and attested in con-

formity with the law of the testator's domicil, is a "consummate and perfect transaction." In one sense it is, no doubt, a finished affair; but I think it is no more consummate than a bond would be which the obligor had prepared for use by signing and sealing, but had kept in his own possession for future use. The cases, I concede, are not entirely parallel; for a will, if not revoked, takes effect by the death of the testator, which must inevitably happen at some time, without the performance of any other act on his part, or the will of any other party; while the uttering of a written obligation, intended to operate *inter vivos*, requires a further volition of the party to be bound, and the intervention of another party to accept a delivery to give it vitality. But, until one or the other of these circumstances—namely, the death, in the case of a will, or the delivery, where the instrument is an obligation—occur, the instrument is of no legal significancy. In the case of a will it requires the death of the party, and in that of a bond a delivery of the instrument, to indue it with any legal operation or effect. The existence of a will, duly executed and attested at one period during a testator's lifetime, is a circumstance of no legal importance. He must die leaving such a will, or the case is one of intestacy: *Betts* vs. *Jackson*, 6 Wend. 173–181. The provisions of a will made before the enactment of the Revised Statutes, and in entire conformity with the law as it then existed, but which took effect by the death of the testator afterwards, were held to be annulled by certain enactments of these Statutes respecting future estates, notwithstanding the saving contained in the repealing act, to the effect that the repeal of any statutory provision shall not affect any act done, &c., previous to the time of the repeal: *De Peyster* vs. *Clendenning*, 8 Paige, 295; 2 R. S., p. 779, § 5; *Bishop* vs. *Bishop*, 4 Hill, 138. The Chancellor declared that the trusts and provisions of the will must depend upon the law as it was when it took effect by the death of the testator; and the Supreme Court affirmed that doctrine. There is no distinction, in principle, between general acts bearing upon testamentary provisions, like the statute of uses and trusts, and particular directions regarding the formalities to be observed in authenticating the instrument; and I do not doubt that all the

wills executed under the former law, and which fail to conform to the new one, where the testators survived the enactment of the Revised Statutes, would have been avoided, but for the saving in the 70th section, by which the new statute was not to impair the validity of the execution of a will made before it took effect: 2 R. S., p. 68. If, as has been suggested, a will was a consummated and perfect transaction before the death of a testator, no change in the law subsequently made would affect it—the rule being, that what has been validly done and perfected respecting private rights under an existing statute, is not affected by a repeal of the law: *Reg.* vs. *The Inhabitants of Denton*, 18 Adolph. & Ellis, 761, per Lord Campbell, C. J.

If then a will legally executed under a law of this State, would be avoided by a subsequent change made in the law before the testator's death, which should require different or additional formalities, it would seem that we could not give effect to one duly made in a foreign state or country, but which failed to conform to the laws of this State, where, at the time of its taking effect by the testator's death, he was no longer subject to the foreign law, but was fully under the influence of our own legal institutions. The question in each case is, whether there has been an act done and perfected under the law governing the transaction. If there has been, a subsequent change of residence would not impair the validity of the act. We should be bound to recognise it by the law of comity, just as we would recognise and give validity to a bond reserving eight per cent. interest, executed in a State where that rate is allowed, or a transfer of property which was required to be under seal, but which had in fact been executed by adding a scroll to the signer's name in a State where that stood for a seal or the like. An act done in another State, in order to create rights which our courts ought to enforce on the ground of comity, must be of such a character that, if done in this State, in conformity with our laws, it could not be constitutionally impaired by subsequent legislation. An executed transfer of property, real or personal, is a contract within the protection of the Constitution of the United States, and it creates rights of property which our own

Constitution guarantees against legislative confiscation. Yet, I presume, no one would suppose that a law prescribing new qualifications to the right of devising or bequeathing real or personal property, or new regulations as to the manner of doing it, and making the law applicable in terms to all cases where wills had not already taken effect by the death of the testator, would be constitutionally objectionable.

I am of opinion that a will has never been considered, and that it is not by the law of this State, or the law of England, a perfect transaction, so as to create rights which the courts can recognise or enforce, until it has become operative by the death of the testator. As to all such acts which remain thus inchoate, they are in the nature of unexecuted intentions. The author of them may change his mind, or the State may determine that it is inexpedient to allow them to take effect, and require them to be done in another manner. If the law-making power may do this by an act operating upon wills already executed, in this State, it would seem reasonable that a general act, like the statute of wills, contained in the Revised Statutes, would apply itself to all wills thereafter to take effect by the death of the testator in this State, wherever they might be made; and that the law of comity, which has been spoken of, would not operate to give validity to a will executed in another State, but which had no legal effect there until after the testator, by coming to reside here, had fully subjected himself to our laws; nor then, until his testamentary act had taken effect by his death.

It may be that this conclusion would not, in all cases, conform to the expectations of testators. It is quite possible that a person coming here from another State, who had executed his will before his removal, according to the law of his former residence, might rely upon the validity of that act; and would die intestate, contrary to his intention, in consequence of our laws exacting additional formalities with which he was unacquainted. But it may be also that a well-informed man, coming here under the same circumstances, would omit to republish, according to our laws, his will, made at his former domicil, because he had concluded

not to give legal effect, in this jurisdiction, to the views as to the disposition of his property which he entertained when it was executed. The only practical rule is, that every one must be supposed to know the law under which he lives, and conform his acts to it. This is the rule of law upon all other subjects, and I do not see any reason why it should not be in respect to the execution of wills.

In looking for precedents and juridical opinions upon such a question, we ought, before searching elsewhere, to resort to those of the country from which we derive our legal system, and to those furnished by the courts and jurists of our own country. It is only after we have exhausted these sources of instruction without success, that we can profitably seek for light in the works of the jurists of the Continent of Europe.

The principle adopted by the Surrogate is that, as to the formal requirements in the execution of a will, the law of the country where it was in fact signed and attested, is to govern, provided the testator was then domiciled in such country, though he may have afterwards changed his domicil, and have been at his death a domiciled resident of a country whose laws required different formalities. Upon an attentive examination of the cases which have been adjudged in the English and American courts, I do not find anything to countenance this doctrine; but much authority of quite a different tendency. The result of the cases, I think, is that the jurisdiction in which the instrument was signed and attested, is of no consequence, but that its validity must be determined according to the domicil of the testator at the time of his death. Thus, in *Grattan* vs. *Appleton*, 3 Story's R. 755, the alleged testamentary papers were signed in Boston, where the assets were, and the testator died there, but he was domiciled in the British Province of New Brunswick. The provincial statute required two attesting witnesses, but the alleged will was unattested. The court declared the papers invalid, Judge Story stating the rule to be firmly established, that the law of the testator's domicil was to govern in relation to his personal property, though the will might have been executed in another State or country

where a different rule prevailed. The Judge referred, approvingly, to *Desesbats* vs. *Berquier*, 1 Bin. 336, decided as long ago as 1808. That was the case of a will executed in St. Domingo by a person domiciled there, and sought to be enforced in Pennsylvania, where the effects of the deceased were. It appeared not to have been executed according to the laws of St. Domingo, though it was conceded that it would have been a good will if executed by a citizen of Pennsylvania. The alleged will was held to be invalid. In the opinion delivered by Chief Justice Tilghman, the cases in the English Ecclesiastical Courts, and the authorities of the writers on the law of nations, were carefully examined. It was declared to be settled, that the succession to the personal estate of an intestate was to be regulated according to the law of the country in which he was a domiciliated inhabitant at the time of his death, and that the same rule prevailed with respect to last wills. I have referred to these cases from respectable courts in the United States, because their judgments are more familiar to the bar than the reports of the spiritual courts in England. But these decisions are fully sustained by a series of well considered judgments of these courts: *De Bonneval* vs. *De Bonneval*, 1 Curt. 856; *Curley* vs. *Thornton*, 2 Addams 6; *Stanley* vs. *Bernes*, 3 Hag. 373; *Countess Feraris* vs. *Hertford*, 3 Curt. 468. It was, for a time, attempted to qualify the doctrine in cases where the testator was a British subject, who had taken up his residence and actual domicil in a foreign country, by the principle that it was legally impossible for one to abjure the country of his birth, and that therefore such a person could not change his domicil; but the judgment of the High Court of Delegates, in *Stanley* vs. *Bernes*, finally put the question at rest. In that case, an Englishman, domiciled in Portugal, and resident in the Portuguese Island of Madeira, made a will and four codicils, all of which were executed according to the Portuguese law, except the two last codicils, and they were all executed so as to be valid wills by the law of England, if it governed the case. Letters were granted upon the will and two first codicils, but the other codicils were finally pronounced against. The reporter's note expresses the result in these words: "If a

testator (though a British subject) be domiciled abroad, he must conform, in his testamentary acts, to the formalities required by the *lex domicilii.*" See, also, *Somerville* vs. *Somerville*, 5 Ves. 750; and *Price* vs. *Dewhurst*, 8 Simons 279, in the English Court of Chancery.

It is true that none of these decisions present the case of a change of domicil, after the signing and attesting of a will. They are, notwithstanding, fully in point, if I have taken a correct view of the nature and effect of a will during the lifetime of the testator. But the remarks of judges in deciding the cases, and the understanding of the reporters clearly show, that it is the domicil of the testator at the time of his death which is to be considered in seeking for the law which is to determine the validity of the will. Thus, in *De Bonneval* vs. *De Bonneval*, the question was upon the validity of the will executed in England, of a French nobleman, who emigrated in 1792, and died in England in 1836. Sir Herbert Jenner states it to have been settled by the case of *Stanley* vs. *Bernes*, that the law of the place of the domicil, and not the *lex loci rei sitæ* governed "the distribution of, and succession to, personal property in *testacy* or intestacy." The reporter's note is, that the validity of a will "is to be determined by the law of the country where the deceased was domiciled *at his death.*"

Nothing is more clear than that it is the law of the country where the deceased was domiciled at the time of his death, which is to regulate the succession of his personalty in the case of intestacy. Judge Story says, that the universal doctrine, as recognised by the common law, is, that the succession to personal property, *ab intestato*, is governed exclusively by the law of the actual domicil of the intestate at the time of his death: Conf. Laws, § 481. It would be plainly absurd to fix upon any prior domicil in another country. The one which attaches to him at the instant when the devolution of property takes place, is manifestly the only one which can have anything to do with the question. Sir Richard Pepper Arden, Master of the Rolls, declared, in *Somerville* vs. *Somerville*, that the rule was, that the succession to the personal estate of an intestate was to be regulated by the law of the country in which he was

domiciled at the time of his death, without any regard whatever to the place of nativity, or the place where his actual death happened, or the local situation of his effects.

Now, if the legal rules which prevail in the country where the deceased was domiciled at his death, are those which are to be resorted to in case of an intestacy, it would seem reasonable that the laws of the same country ought to determine, whether in a given case, there is an intestacy or not, and such we have seen was the view of Chief Justice Tilghman. Sir Lancelot Shadwell, Vice-Chancellor, in *Price* vs. *Dewhurst*, also expressed the same view. He said, "I apprehend that it is now clearly established by a great variety of cases, which it is not necessary to go through in detail, that the rule of law is this: that when a person dies intestate, his personal estate is to be administered according to the law of the country in which he was domiciled at the time of his death, whether he was a British subject or not; *and the question whether he died intestate or not, must be determined by the law of the same country.*" The method of arriving at a determination in the present case, according to this rule, is to compare the evidence of the execution of his will with the requirements of the Revised Statutes. Such a comparison would show that the deceased did not leave a valid will, and, consequently, that he died intestate.

Being perfectly convinced that according to the principles of the common law, touching the nature of last wills, and according to the result of the cases in England and in this country, which have been referred to, the will under consideration cannot be sustained, I have not thought it profitable to spend time in collecting the sense of the foreign jurists, many of whose opinions have been referred to and copiously extracted, in the able opinion of the learned Surrogate, if I had convenient access to the books, which is not the case.

I understand it to be conceded that there is a diversity of opinion upon the point under consideration among most writers; but it is said that the authors who assert that the doctrine on which I have been insisting, are not those of the highest character, and that their opinions have been criticised with success by M. Felix himself, a

systematic writer of reputation on the conflict of laws. Judge Story, however, who has wrought in this mine of learning with a degree of intelligence and industry which has excited the admiration of English and American judges, has come to a different conclusion. His language is, "but it may be asked, what will be the effect of a change of domicil after a will or testament is made, of personal or movable property, if it is valid by the law of the place where the party was domiciled when it was made, and not valid by the law of his domicil at the time of his death? The terms in which the general rule is laid down would seem sufficiently to establish the principle that in such a case the will and testament is void; for it is the law of his actual domicil at the time of his death, and not the law of his domicil at the time of his making his will and testament of personal property, which is to govern:" § 473. He then quotes at length the language of John Voet to the same general effect. It must, however, be admitted that the examples put by that author, and quoted by Judge Story, relate to testamentary capacity as determined by age, and to the legal ability of the legatees to take, and not to the form of executing the instrument. And the Surrogate has shown, by an extract from the same author, that a will executed in one country according to the solemnities there required, is not to be broken solely by a change of domicil to a place whose laws demand other solemnities. Of the other jurists quoted by the Surrogate, several of them lay down rules diametrically opposite to those which confessedly prevail in this country and in England. Thus, Toullier, a writer on the civil law of France, declares that the form of testaments does not depend upon the law of the domicil of the testator, but upon the place where the instrument is in fact executed; and Felix, Malin, and Pothier are quoted as laying down the same principle. But nothing is more clear upon the English and American cases, than that the place of executing the will, if it is different from the testator's domicil, has nothing to do with determining the proper form of executing and attesting. In the case referred to from Story's Reports, the will was executed in Boston, but was held to be invalid because it was not attested as required by a provincial statute of New Brunswick,

which was the place of the testator's domicil. But if the present appeal was to be determined according to the civil law, I should desire to examine the authorities more fully than I have been able to do; but considering it to depend upon the law as administered in the English and American courts, and that according to these tribunals it is the law of the domicil of the testator at the time of his death that is to govern, and not that of the place where the paper happened to be signed and attested, where that is different from his domicil at the time of his decease, I cannot doubt that the Surrogate and Supreme Court fell into an error in establishing the will.

I have not overlooked an argument which has been addressed to us, based upon certain amendments of the Revised Statutes, contained in chapter 320 of the act of 1830. The revised code of the State, as originally enacted, had omitted to make provision for the proving of wills, where the attesting witnesses resided out of the State, and their attendance here could not be procured. The Surrogates' Courts to which they committed the proof of wills of real and personal estates, being tribunals of special jurisdiction, and having no common law powers like the Supreme Court, could not issue a commission in such cases, and hence there might often be a failure of justice. It might happen, in various ways, that the witnesses to a will would reside out of the jurisdiction of this State. If the will were executed here by a resident citizen, in the usual manner, the witnesses might change their residence and live in some other State or country, when it came to be proved; or it might be executed out of the State according to the forms prescribed by our statute of wills, by a resident of this State who was temporarily abroad. In either case, the will would be perfectly valid, though the Surrogate having jurisdiction would be unable to admit it to probate for want of power to cause the testimony to be taken and returned. To remedy this inconvenience, five new sections were introduced, in 1830, by way of amendment, to the title of the Revised Statutes, respecting the proof of wills, numbered from 63 to 67, inclusive. The provision which they make is limited to the case of "a will duly executed according to the laws of this State, where the witnesses to the same reside out of the jurisdiction

of this State;" and, in regard to such wills, it is enacted that they may be proved by means of a commission issued by the Chancellor upon the application of any person interested; and detailed directions are given respecting the return of the proof, the allow ance of the will, and the record of it in the office of the Surrogate having jurisdiction.

But, thus far, the proof of a will made in a foreign jurisdiction, according to the laws of such jurisdiction, and taking effect there by the death of the testator, was left unprovided for. Such wills are perfectly valid as to personal assets in this State, as was shown in *Parsons* vs. *Lyman*. We recognise the foreign will, according to the comity of nations, just as we do the rules of distribution and of inheritance of another country when operating upon a domiciled citizen of such country who has died there, leaving assets in this State. Then, as to the proof of such wills, the section following those just mentioned provides for the case in these words:—"Wills of personal estate, duly executed by persons residing out of this State, according to the laws of the State or country in which the same were made, may be proved under a commission to be issued by the Chancellor, and when so proved, may be established and transmitted to the Surrogate having jurisdiction," &c., § 68. The remainder of the section provides for the case of such a foreign will which has been proved in the foreign jurisdiction. Letters testamentary are to be issued in such cases upon the production of an authenticated copy of the will. It is clearly enough implied, perhaps, by the language of this section, that the will to be proved and established under its provisions, and which is allowed to be executed, as to assets, in this State, must be a legal will, according to the law of the testator's domicil in which it was executed; but, for abundant caution, a section is added to the effect that "no will of personal estate, made out of this State, by a person not being a citizen of this State, shall be admitted to probate under either of the preceding provisions, unless such will shall have been executed according to the laws of the State or country in which the same was made," § 69. Chancellor Walworth appears to have understood the words, "a citizen of this State," as used in this section, to refer

to political allegiance; and, "in the matter of Roberts's will," 8 Paige, 446, he held that the will then in question, executed in the island of Cuba, and which had been proved under a commission, and had been shown to be executed according to the laws of Spain, was a legal will, though the testator was a resident of this State at the time of his death. But he put the decision on the ground that the testator was a foreigner, and not a citizen, though domiciled here, and upon a verbal construction of the 69th section. But Mr. Hunt, the alleged testator in the will now in question, was not only domiciled here, but he was, at his death, a citizen of this State, and, consequently, the section, as interpreted by the Chancellor, has no application to the case. He, however, fully admitted the rule of law to be as I have stated it, in cases not within the influence of the 69th section. "The provision of the Revised Statutes requiring wills of personal property to be executed in the presence of two witnesses," he says, "does not apply to wills executed out of this State by persons domiciled in the State or country where the will is made, and who *continue* to be thus domiciled at the time the will takes effect by death." "As the testator resided in this State at the time of his death, in 1837, this will would be valid according to the law of the testator's domicil *when the will took effect by death*, if he had been a citizen at that time. But, as he was a foreigner, and there is no evidence that he was ever naturalized here, the amendments of the Revised Statutes of 1830, under which the present proceedings are instituted, expressly prohibit the admitting of the will to probate by a decree of this Court, unless it was also duly executed according to the laws of the country where it was actually made." But for this case, I should have been of the opinion that the words, "a citizen of this State," as used in the 69th section, did not refer to political allegiance, but were used in the sense of a domiciled inhabitant of this State. The meaning of the section would then be, that, if a person, other than a domiciled inhabitant of this State, makes his will out of this State, it must be executed according to the laws of the State or country where made, or it cannot be admitted to probate here, according to the preceding provisions of the act. The Chancellor seems to me to have taken the

same view of the statute when passing upon the execution of the will of Catharine Roberts: 8 Paige, 519. He says, "The statute, in express terms, authorizes a will personally executed out of the State, *by a person not domiciled here*, to be admitted to probate, provided it is duly executed according to the laws of the State or country where the same was made; and prohibits all other foreign wills from being admitted to probate, under the special provisions incorporated into the statutes of April, 1830." The words, "a person not domiciled here," are used in the paraphrase as the equivalent of "a person not being a citizen of this State," and I think that rendering is perfectly correct. The provisions of the act do not, in my opinion, suggest any distinction between the place where a will is actually signed and attested and that in which it takes effect by the death of the testator. They are intended to provide simply for the case of the will of a person domiciled out of the State which it is desired to prove here; and the statutory mandate is, in effect, that it shall not be established here unless it was executed according to the requirements of the foreign law.

The will under immediate consideration was not, we think, legally executed, and the determination of the Surrogate and of the Supreme Court, which gave it effect, must be reversed.

COMSTOCK, Ch. J., LOTT, JAMES, and HOYT, JJ., concurred.

The precise question discussed and adjudged in this case, has, it is believed, not been decided in England. In this country, the only case in which it has been previously adjudged, is Nat *vs.* Coons, 10 Missouri, 543. The will in that case was executed in Mississippi, the testator's domicil, in 1836. The testator removed to Missouri in 1837, and resided there till his death in 1838. It was held that the instrument was a Missouri will, and that its validity must be tested by the law of that State. This case, though it agrees in its conclusions with the present, was not fully argued, and has not been often cited. The *principles* which ought to govern the question are well established, and evince the correctness of the decision.

I. It is a well settled rule in regard to *contracts*, that the law of the place where they are made controls the formalities and solemnities attending their execution. If valid there, they are valid everywhere.

II. It has been attempted on the continent of Europe to extend the same rule to wills. The maxim is "locus regit actum." The French Court of Cassation has declared that the forms of the place of making the will are to be preferred to the law of the domicil. Fœlix on International Law, 3d edit., p. 166, note a. Savigny, however, recommends that a

person who makes his will abroad should on his return make another, Vol. 8, p. 356.[1] It is only safe to follow these authors as guides, when we bear in mind that they attempt to apply to a *will* the same rule which exists as to a *contract*.

III. This doctrine has found no lodgement in the common law as expounded by the courts in England, or by text writers. Says Dr. Lushington in Croker *vs.* M. Hertford, 4 Moore, P. C., 358, "there is a wide distinction between a will and a contract." The validity of a will of personal estate as to form is to be governed by the law of the place of the testator's domicil. So that if he reside in one place, and make his will in another State, where all his personal property may be, the validity of the will is to be determined by the law of the place of his residence. The maxim "*mobilia sequuntur personam*" when applied to wills, means that personal property follows the law of the testator's domicil. The leading case on this subject is Stanley *vs.* Bernes, 3 Hagg. 373, and is so pronounced by Lord Wensleydale, in Whicker *vs.* Hume, 7 House of Lords Cases, 165. See also Bremer *vs.* Freeman, 10 Moore Priv. C. Cas. 306. That case was argued for the principle by Dr. Lushington when at the bar, and the conclusions then presented are approved by him as a judge. It was there held that an Englishman domiciled abroad (in Portugal) must conform in his testamentary acts to the formalities required by the lex domicil. The reasons of the decision are not given by the "Delegates," who reversed Sir John Nicholl's decision to the contrary, but they undoubtedly proceeded on Dr. Lushington's argument.

This argument is so clear and conclusive that it is worthy of being reproduced. "The fact of the codicils being executed in the English form, whether used as an argument to show the testator's intention of returning, or for their validity, amounts to nothing. It is said, it was his intention not to adopt the Portuguese forms; it was his intention to pass his property in England, and the question is, could he do so in the way he has adopted? If intention alone is to have effect, there would be no need of any form; but the law of all countries requires that the intention should be expressed so that the law may understand it, and that the personal property may be distributed according to its rules. If it be a clear principle of law that personal property has no locality, that the law of the place (of the property) is not to be looked to at all, it follows as a necessary deduction, that the case of a party dying leaving a will must be liable to the same rules as in a case of intestacy. *The law which binds the person governs the effects.* If then the person of the testator was governed by the law of Portugal, so must the will be—if the property is distributable by the law of Portugal, the instrument should be valid by that law. If intestate, it is conceded that his property, in whatever country, would pass according to the Portuguese law; how then are we to find whether he is intestate or not? If the will by

[1] This suggestion was made on account of Eichhorn's view, (Deutsches Recht, § 37), that the maxim "locus regit actum" has one qualification, which is that if a testator who had made his will abroad in a manner not allowed by the domicil, returned to his home before death, the will would be void. This idea has not been adopted by others.

the Portuguese law is invalid, he is intestate in Portugal. Supposing it to be valid by every other law, but invalid by the law of Portugal, then the property would go according to the Portuguese law as in a case of intestacy. We contend then on principle, if it be once established that in cases of intestacy the law of the domicil is to prevail, it must follow that in testacy, it must also, otherwise you cannot find out whether the party be intestate or not." No clearer or more compact statement of the principle can be found or desired, and the decision has been recognised over and over again. Foreign law then cannot be cited upon the subject of the testamentary acts of testators domiciled here, with any profit. In fact, it is a matter of mere municipal regulation. "There is no instance in which foreign law has been resorted to as a guide whether a testamentary paper of a domiciled Englishman should be valid or not:" 4 Moore P. C. 358. "The law of domicil is alone regarded, and the rule 'locus regit actum' cannot prevail over it. No trace in the history of English testamentary law is to be found of the introduction of this principle, and it is difficult to discover how the laws of other nations on matters which are *purely municipal*, should form any sufficient ground for the introduction of a new statute to govern the testamentary acts of domiciled Englishmen." Id. The doctrine enunciated in Stanley *vs.* Bernes is approved in this country in the cases cited in the principal case.

IV. The question still remains as between the domicil at the time of execution of the will, and the domicil at the time of death. There are two questions: 1. By which of the two shall the "intrinsic validity" of the will be governed? By this phrase is meant, the proportion of the estate which can be disposed of, the capacity of the testator, and of the legatees, the power to disinherit heirs, &c., &c. Nearly all jurists agree that such questions are to be determined by the law of the domicil at the time of death. Fœlix on International Law, § 117. Says this author, "the intrinsic validity of acts depends on the law of the place where they have received their perfection or completion," 8 Savigny, 312; Westlake on Private International Law, 328.

2. The second question is as to the "formal or extrinsic validity" of the will. If a will is duly executed by the law of the domicil, and afterwards the domicil is changed and continues so until death, shall the law of the latter domicil prevail? Fœlix answers this question in the negative. He places his determination, however, upon the maxim, which the English law discards, "locus regit actum." "The will preserves its validity as far as form is concerned, notwithstanding a change in the testator's domicil, *because* this form depends on the law of the place where the will was made;" (le testament conserve sa validité quant à la forme, nonobstant le changement de domicile du testateur, *parceque* cette forme depend de la loi du lieu de la confection de l'acte,) § 117, also § 77. This reason, though perfectly legitimate under the French law, is of no force here, since the decision of Stanley *vs.* Bernes, which declares the law of the domicil to be the rule which governs the original validity of the act.

Mr. Westlake, although he discards the maxim, "locus regit actum," as applicable to wills, agrees with Fœlix in the result. His reasons are as follows: "If a change be made from a foreign domicil to an English one, we shall have to decide for ourselves on the continuing validity of the foreign will, and then I submit it should be maintained whenever

conformable either to the 'lex loci conditi testamenti,' or to the law of the then domicil, for it can never be imagined, that by the transference of his domicil to England the testator intended tactitly to revoke his will, more especially since by the continental law, with which alone from his previous life he can be supposed to be acquainted, such transference would not have that effect:" Westlake on Private International Law, § 323, 4, 5, 6, 7, 8. The author here falls into a double mistake. First, in supposing that this question is one simply of a foreign testator domiciled here, which will be shown hereafter not to be true; and, second, in maintaining that the intention of the testator has anything to do with the *validity* of a will. "The law that binds the person governs the effects." The law of the domicil at the time of the testator's death must prevail, for the following reasons:

1. Because on the distinction which the continental writers make between the extrinsic and intrinsic validity of the will, between matters of form and matters of substance, the law as to the number of witnesses, and the solemnities attending the execution of the instrument, belongs to substance, and not merely to form. The witnesses are placed about the testator to watch his capacity, and to observe that no fraud is practised, or undue influence or restraint exercised, and, in general, to see that his intentions are carried into effect. They are placed thus by the law, and not by the testator. It is true that he selects them, but the law declares their function. They are in a sense ministers of justice. Fœlix candidly admits this difficulty. "The qualities of notaries, and of witnesses, may be regarded as belonging to intrinsic formalities—the circumstance that the laws exact in the witnesses of the act certain qualities which it does not require in those who depose simply in a court of justice to facts of which they have knowledge, shows that in assisting at the making of a will, the witnesses exercise, so to speak, a public authority. Thus, the ancient authors regard the assistance of the witnesses, and their number, as a substantial, and not as a probative formality:" § 71, note 1. On this principle, in accordance with their own distinction, the foreign jurists should hold that the law of the domicil at the time of death should govern the transaction, except as to mere matters of form, such as the necessity of affixing a seal, or the writing the will upon some particular substance.

2. If a testator, domiciled in a State where he made his will, continued to be so domiciled at the time of his death, the validity of the will could only be determined at death. His capacity might be restricted or taken away, the will might be made inoperative, or its effect might be enlarged. Such a statute would be in no sense retrospective, nor would it interfere with vested rights, because heirs, devisees, or legatees, have no rights until the testator's death. The *rules of construction* would, therefore, be in no sense violated by holding that a statute of this kind operates upon anterior as well as upon subsequent wills. Cases of the first kind, affecting capacity, are Wakefield *vs.* Phelps, 37 N. H. 295; Loveren *vs.* Lamprey, 2 Foster, N. H. 434; cases of the second class are stated in the opinion; cases of the third class, where the effect of the will was enlarged, are Cushing *vs.* Alwin, 12 Met. 169, (1847); Pray *vs.* Waterston, Id. 262. They all proceed upon the same principle. Though Brewster *vs.* McCall, 15 Conn. 274, and Mullock *vs.* Souder, 5 Watts & Sergeant, 198, are contrary to this view, the principle will not be shaken. They were decided without extensive argument, without

satisfactory reasons for the judgments, and are opposed to the current of decisions. The case in Watts & Sergeant is made to depend upon a certificate given by the judges to the Chancellor, in Ashburnham *vs.* Bradshaw, 2 Atk. 36, followed by Willett *vs.* Sandford, 1 Ves. 176. The question there was, whether a will of real estate, made before the Statute of Mortmain, 9 Geo. 2, c. 36, the testator having survived the passage of the act, was rendered void so far as it came in conflict with that law. It was decided that the will was not affected by the statute. This case was, however, evidently disapproved by the Lord Chancellor in Attorney-General *vs.* Heartwell, Ambler, 451, where he states that the decision cannot be applicable to personal property. "The statute makes an intestacy." It could only be applied to real estate, because a devise was regarded as in the nature of a conveyance. The case itself must be considered as overruled in this country by the decisions previously cited, which were, in some instances, devises of real estate.

Assuming these cases to be correct, they decide that a statute operating upon a will, may destroy it, and that all persons domiciled here when the will was made, and when the statute took effect, would be governed by it. What possible distinction can be stated between this and other classes of domiciled persons? Many persons discuss this question as though it were one of private international law. It is, however, one of purely *municipal law*, as Dr. Lushington states it. This will appear from the following supposed cases. There may be suggested, among others: 1st. The case of a domiciled citizen, who, having been subsequently domiciled abroad, made his will and returned to his original residence. 2. The case of a domiciled foreigner under the same facts. 3. The case of a foreigner, who, having made his will at his home, becomes a resident naturalized citizen. 4. The case of a foreigner, who, having made his will at home, becomes domiciled here—a resident alien. The first case would resolve itself into the question, Can, or should, the State govern that class of its resident citizens who have once been domiciled abroad, in the same manner as other citizens? The laws of the State operate upon the wills of all permanently residing citizens, deciding their validity at the moment of death. Can any reason be suggested why this should not be true of *all* resident citizens? Every new statute of general nature ought undoubtedly to be construed to govern all the citizens who were subject to it at the time of its passage, unless it would operate retrospectively, or be contrary to some constitutional provision. The power of the State to give this effect to the statute, no one will deny. The foreign rule does not rest upon positive right, but upon consent, express or implied: Fœlix, § 68. As the question then becomes one purely of *construction* of a statute, it is impossible to state any valid reason for exempting one class of citizens and not the other. A will made abroad by a citizen afterwards returning to his native country, certainly ought not, upon principles of comity, to be any *more* sacred than one made at home.

If this be true of statutes passed *after* the citizen became re-domiciled, it would be equally true of previously existing laws. Otherwise, it would be necessary to re-enact the statutes continually to bind citizens, once residing abroad, and resuming their former domicil. We cannot, therefore, escape the conclusion, that the statute of wills ope-

rates upon all native born citizens domiciled here at their death, and that the question is wholly one of *domestic law.*

No reason can be stated why the other cases should not be solved in the same way, since the case of Stanley *vs.* Bernes, has decided that domiciled foreigners are subject to our laws regarding wills, in the same manner as domiciled citizens.

The result is, that in all cases of the execution of a will of personal estate, the law of the domicil where the will is made, is only provisional. If the instrument is not, in fact, executed according to that law, yet, if the solemnities required by the laws of the domicil at the time of death, happen to be observed, the will is valid. So, on the other hand, if the law of the domicil is observed, the will is void if the solemnities of the final residence are not complied with.

3. The rules as to the distribution of intestate's estates are admitted to be those prevailing at his domicil at the time of his death.

If that be so, the argument of Dr. Lushington, and of the opinion in the principal case, is conclusive to show that the same law must decide whether he did or did not die intestate.

4. Perhaps some weight should be given to the view that the right to make testaments belongs to the domain of positive law, and cannot be claimed as an inherent or natural right: See the elaborate historical examination of the subject in Maine's Ancient Law, Ch. 6 & 7; London, 1861.

The author remarks that "it is doubtful whether a true power of testation was known to any original society except the Roman." The general argument, however, is not affected, though this proposition should prove untrue.

While no adjudged cases in England decide the point, the tendency of judicial opinion is in this direction. In addition to the cases alluded to in the opinion, Whicker *vs.* Hume, 7 House of Lords Cases, 124, may be cited, where the statement by all the judges is, that the law of the domicil, at the time of death, is to govern the will, and the following distinct expression from the Judicial Committee of the Privy Council, Lord Wensleydale delivering the opinion: "It is not necessary to discuss the question as to what law should govern when a testator changes his domicil after making his will, but their lordships do not wish to intimate any doubt that the law of domicil at the time of death, is the governing law: Story, § 473; nor any, that the statutes 7 W. IV. and 1 Vict. c. 26, apply only to wills of those persons *who continue to have an English domicil*, and are consequently regulated by the English law:" Bremer *vs.* Freeman, 10 Moore P. C. 306—359.

T. W. D.